No. 11,737

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILO W. BEKINS and REED J. BEKINS as Trustees under the Last Will of Martin Bekins, Deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION DISTRICT,

Appellee.

CLOSING BRIEF FOR APPELLANTS.

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Berg Building, Turlock, California,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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PRELIMINARY STATEMENT.

Appellants undertake to answer the brief of appellee and in so doing will follow the general headings set forth in the brief for appellee. There are some matters concerning the facts and evidence which should first be referred to.

There is an unintentional error in the statement made on page 12 of Brief for Appellants where it is stated in effect that the application for leave to sue on the bonds was made to the District Court June 13, 1946, referring to the record as R. 10 and 12. This statement is apparently concurred in by appellee at

page 6 of its brief. However, appellee does make the proper statement at page 11 saying that the motion was filed October 7, 1946. This is the correct date (R. 14). The explanation of this error is that the application is dated June 13, 1946 (R. 12) and although it does not appear in the record, the application had been presented to Judge Goodman, *ex parte,* at about that time, who eventually directed counsel to make a formal application on notice. Hence the application was filed October 7, 1946 (R. 14).

ARGUMENT.

A. RULE 60 IS A BAR TO APPELLEE'S APPLICATION.

Appellee states that the application which they (appellants) had made for leave to sue was nothing more than an application to modify the final decree (page 13, appellee's brief). The application to the Court was merely a matter of proper practice. The final decree had already been amended. The District Court in its order granting the motion to modify the final decree, January 25, 1946 (R. 5, 6) used this language, "or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein."

That language seems to be clear and unambiguous. It sweeps aside everything in the final and interlocutory decrees upon the failure of the district to

put up its money. The application for leave to sue was merely a request for confirmation by the Court that the trustees were no longer bound by the final and interlocutory decrees. It was not an attempt at modification of the decree. Consequently Rule 60 definitely applies.

The case of *U. S. v. Klapprott,* 6 F.R.D. 450 cited by appellee on the same page of its brief is not in point, for that case refers to an independent "action" to relieve a party from a "judgment, order or proceeding." The appellee undertook no such procedure in any of its proceedings. It neither undertook a proceeding in the nature of a bill of review or an independent action.

No explanation is made in appellee's reply as to why an extension of time was not sought by the appellee before the 30 days was up. Rule 6 (b) Federal Rules of Civil Procedure reads:

> "Enlargement. When by these rules or by a notice given thereunder or by order of Court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; * * * "

The appellee has not even now claimed that its failuse to pay was an oversight in some manner and

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The appellee has not even now claimed that its failuse to pay was an oversight in some manner and

therefore "excusable neglect". If it actually did not have the money at the time, it could have requested an extension of time from the court before the 30 days was up. The fact that it did not apply for an extension might imply that it had no just grounds for making application.

Not only did the appellee fail to take advantage of the above quoted rule and apply to the court for an extension, but it also failed to seek an unofficial extension of time from the trustees or their counsel. The appellee's brief fails to give any reason for failure to take this precaution which is normally granted as a courtesy between attorneys. Instead, the appellee failed to deposit any money until after October 7, 1946, when the trustees sought leave to sue.

The appellee in its brief (page 12), attempts to show that the trustees are inconsistent in their position regarding Rule 60. As to the extension of time to present their bonds granted in case number 10,934 (*Bekins v. Compton-Delevan I. D., supra*) that might well come under the exception in rule 6 (b) for excusable neglect. The six months rule would not be applicable in such circumstances. The decision however in that case seems to be founded on the failure to give notice of the entry of the decree. In the present proceedings the trustees are merely seeking the relief that the final order of January 25, 1946, gave them, namely: "upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no

longer be bound by the terms of the final decree or interlocutory decree herein". In other words, they are seeking leave to sue free, of any restraint, and the Court was asked to determine that the conditions precedent existed.

B. CIRCUIT AND DISTRICT COURTS' INTENTION.

In a sense it does not matter what the Circuit Court intended in reversing the previous case, because there was a right of appeal from the order which followed the mandate, and the order was quite clear that upon failure to deposit the consideration for the composition the trustees would be free of the contract. Let us suppose, while considering this for a moment, that the Compton-Delevan District had failed to make any deposit for any of the creditors. Obviously they would not have been bound by the interlocutory decree, and that is all that the Court did here in ordering that upon failure of the Compton-Delevan District to put up the money the trustees would be freed entirely of the composition agreement.

The district, as we have pointed out before, objected to the very words which the judge left in the order which was entered after the mandate came down, but did nothing about it, neither by appeal nor by motion under Rule 60, nor by application under Rule 6 (b) or otherwise.

The District Court left out of the proposed order that part which appellants had proposed and which is quoted by appellee on page 6 of its brief. (Inci-

dentally the appellee italicizes the words "in full" whereas it is not italicized in the proposed order which is copied from R. 80.) There were reasons why the Court omitted this paragraph or phrase from the order, but there are very cogent conclusions from the fact that he left in the order the language to the effect that the trustees would no longer be bound by the terms of the decree. If the trustees are no longer bound by the terms of the final or interlocutory decrees, there can hardly be any implication that they are not bound by certain *specific* terms, for the order states flatly that they are not to be bound by "the terms" which means *all the terms.* There was no thought in the Court's mind of distinguishing between the composition figure and the figure expressed by the face value of the bonds.

The appellee attempts to construe the order of January 25, 1946, and the Court below has construed it in the order complained of to mean that if the district went in default and did not pay during the thirty day period then the trustees could sue, but only for the *composition figure.* If one looks at the interlocutory and final decrees in case number 10,934, the injunction against suing is one against any and all sums rather than the composition figure.

However, there is nothing to indicate that the Court had the injunction feature solely in mind when it provided that the trustees would be relieved from all the terms of the interlocutory and final decrees. The Court was merely carrying out the provisions of the Municipal Bankruptcy Act itself which contemplates

and provides only for a composition agreement becoming binding upon the creditors *if the district puts up the consideration.*

C. APPELLANTS ARE NOT ESTOPPED FROM ATTACKING COURT'S ORDER.

Appellee states at page 18 of its brief that a modification of the final decree is necessary to gain permission to sue on the bonds. This on the theory that the application had been denied before. It was merely not time for the Court to determine whether permission would be granted, as that could well be left to the future or perhaps the Court had in mind that it wasn't necessary to ask for any permission at all if the events occurred which entitled appellants to be freed of the terms of the decree.

Should the trustee be estopped to proceed in this appeal because the clerk of the Court mailed to them a check for costs which they cashed, and then a few weeks later the trustees returned to the clerk the sum so received?

It would seem that the essential elements of estoppel are lacking and that it would be unfair to refuse to listen to the trustees because of the clerk's action and their temporary receipt of the funds.

31 C. J. Secundum p. 236 reads:

> "Equitable estoppel is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and equity, from asserting right which might perhaps have other-

> wise existed, either of property, of contract, or of remedy, as against another person who in good faith relied on such conduct, and has been left thereby to change his position for the worse and who on his part acquires some corresponding right either of contract or of remedy; * * *."
>
> "This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

In the present case the clerk of the Court took the initiative in mailing out the cost check. The trustees, it is true, accepted it for a short time, but by returning it they have gained no benefit from so receiving it. There is no showing that the district changed its position in reliance on the action of the trustees. In fact, it is doubtful if the district was aware of the fact that the check was ever cashed until after the money was returned.

This money which was deposited in Court did not draw interest and the district had not suffered by the temporary withdrawal of the funds.

Therefore, the district cannot rely on estoppel because (1) there was no reliance by the district or (2) change of position for the worse. In addition, the act of the trustees in a sense was not "voluntary" as it was more or less a mechanical act without any intent to accept the offer of the district to pay costs

and the composition figure. The record shows that the money was promptly returned when counsel realized that the district might be misled if it learned of the clerk's action.

In addition, the district could not have had the use of the money during the time when it was withdrawn from Court. In no manner can it be said that the district was prejudiced by this oversight in the trustees receiving the check.

In any event, had the trustees retained the $375 it is much less than the amount which the trustees will be entitled to receive whether this appeal results in reversal or affirmation of the order appealed from.

D. EQUITIES.

The district failed to answer the trustees' question regarding where the money came from that was eventually deposited in Court. The appellee in its brief spends several pages showing its frustrated efforts to obtain a loan fro mthe Reconstruction Finance Corporation but nowhere does it explain where the money did come from.

Sympathy for the poor district is sought because the board resigned on June 19, 1946. However, that was after the 30 days had expired in which the money was to be put up so the resignation could not be an excuse for the original default.

We find no equities shown by the appellee. For reasons of public policy statutes have provided ways

for the insolvent debtors to be relieved of their legal obligations to their creditors by voluntary proceedings. However, if the statute is not strictly complied with, the debtor may not complain if he finds that he still owes one creditor in full. For example, when the creditor's claim is not included in the schedule of debts, and the creditor is never notified to file a claim. Creditors who are notified and become bound may not complain if some other creditor is not barred because of lack of notice or even the debtor's intentional oversight.

In the present case, the debtor failed originally to give the required notice and the Court allowed the creditor an extension of time in which to present the bonds. In turn the Court said that if the debtor did not make available the funds within a specified time after the bonds were presented then the creditor would not be bound by the interlocutory and final decrees. As a condition precedent to relief, the debtor was to put up the money. Since the condition was not complied with and no extension of time was ever sought or granted before the time had expired, the whole composition proceeding as to the trustees was ineffective. Therefore(the Court below was in error in not granting the trustees leave to sue for the full amount.

The implication on page 22 of appellee's brief is that the Bekins Trustees objected to the settlement. That is not borne out by the facts. One of the trustees having become ill, the business matters were not given the attention. This trustee, Mr. Reed J. Bekins, has

subsequently passed away as a result of his illness. There was no answer or objection made to the plan of composition. There has merely been this attitude of the district to try to deprive these creditors of any money whatsoever, in spite of the fact that the Court ordered them to restore the funds that were illegally sent to the Reconstruction Finance Corporation. We have shown in our opening brief that the district could have obtained this money in many ways, and our statements are not adequately refuted or replied to. We have shown here also that the failure of the district to comply with the composition as to one creditor is not a preference or priority. It is merely a penalty for the district failed to keep its part of the bargain.

The Court's order granting the application of the district for interpretation of the Court's order made as a result of the mandate itself fails to do equity as it merely allowed the $2200 and attorney's fees without even interest, but our complaint is not on that score alone.

At page 2 of appellee's brief it purports to state a reason why the presentation of appellants' bonds was refused and why it refused to pay the composition figure, stating on this page that the district did not have any of the money to effect the composition, that the balance had remained in the registry of the Court, and by the registrar of the Court was forwarded to the Reconstruction Finance Corporation. It may be pointed out that in the previous appeal, *Bekins v. Compton-Delevan,* 150 Fed. (2d) 526 this Court held

that the money "belongs to appellants, not to appellee." Appellee admits that even on May 24, 1946, there was $3700 in the Bond Reserve fund (Appellee's Brief, page 21), but contends that under the agreement with the R.F.C. this fund could be used for no other purpose than specified in the agreement. However, since the money which the R.F.C. received from the Registrar belonged to the appellants, there seems to be no legal reason why the money could not have been taken out of the Bond Reserve fund and paid to the trustees upon presentation of their bonds.

CONCLUSION.

Wherefore, we respectfully represent that the order below should be reversed and trustees granted leave to sue.

Dated, Turlock, California,
April 8, 1948.

Respectfully submitted,
W. Coburn Cook,
Attorney for Appellants.

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APPELLANTS' PETITION FOR A REHEARING.

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ary 25, 1946 (R. 5). Further that the bonds were actually surrendered for payment.

ARGUMENT.

The Order Granting Motion to Modify Final Decree (R. 5) is the point of contention in this appeal. This order provided (R. 6): "said trustees may, within thirty (30) days after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, * * * bonds * * *, and upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of $2200.00 * * *, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein."

The gist of this Court's opinion, as we see it, is contained on page 4 of the printed opinion in the following language:

> "As indicated above, appellants presented their bonds to appellee's treasurer within the 30-day period specified in the order of January 25, 1946, and appellee failed to pay appellants the $2,200 and the $161.60 mentioned above. Appellants contend that, upon such failure, they were no longer bound by the terms of the final decree and hence should have been permitted to bring suits to enforce payment of their bonds in full. We do not

agree. The order of January 25, 1946, required appellee to pay appellants the $2,200 and the $161.60, not upon the mere presentation of their bonds to appellee's treasurer within the specified period, but upon the presentation and surrender of their bonds to appellee's treasurer within the specified period. Appellants' bonds were not surrendered to appellee's treasurer within the specified period or at all. Hence the final provision of the order of January 25, 1946, was inapplicable."

WHAT THE EVIDENCE SHOWS.

The evidence on the motion was contained in affidavits.

The affidavit of Reed J. Bekins (R. 13) states: "that he caused the bonds to be presented to the treasurer on March 25th, 1946, for the purpose of *delivery and surrender* thereof *and cancellation* by the said Treasurer, upon the payment to him of $2200 together with costs in the amount of $161.60," We respectfully contend that it is not the custom or procedure ever to surrender any bonds except upon payment. The two acts are simultaneous. The tender of the bonds was definitely made. They were in the words of Bekins "presented for surrender". (Emphasis ours).

This is no more than the Water Code of the State of California requires. Section 24500 reads:

> "Upon presentation of any matured bond of the district, the treasurer shall pay it from the bond principal fund."

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellants respectfully petition this Court for a rehearing of this appeal on the following grounds:

It is respectfully submitted that the surrender of the bonds to the Treasurer without payment was not a condition of the Court's order and this Court should correct its decision to hold that the appellants did fully comply with the order of the Court dated Janu-

ary 25, 1946 (R. 5). Further that the bonds were actually surrendered for payment.

ARGUMENT.

The Order Granting Motion to Modify Final Decree (R. 5) is the point of contention in this appeal. This order provided (R. 6): "said trustees may, within thirty (30) days after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, * * * bonds * * *, and upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of $2200.00 * * *, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein."

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This is no more than the Water Code of the State of California requires. Section 24500 reads:

> "Upon presentation of any matured bond of the district, the treasurer shall pay it from the bond principal fund."

Section 24505 reads:

"A bond presented but not paid shall be stamped * * *"

Had they been surrendered and cancelled without payment, Bekins could never have under any conditions been relieved from the restraint in the decree prohibiting him from bringing suit on the bonds.

After the effort to surrender the bonds on March 25, 1946, they remained on deposit with the bank in Chico and "were available at any time for payment as provided in said order". The testimony is uncontradicted (R. 13) that the Treasurer "failed and refused to take and accept delivery and surrender of said bonds".

In fact, the affidavit of Jerome D. Peters, Counsel for appellee (R. 15, 19) bears this all out. "Thereafter and on or about March 25, 1946, the Bekins bonds were sent to the Chico Branch of the Anglo California National Bank with instructions to present and deliver said bonds upon payment of the sum of $2200.00 plus $161.60 costs of suit. That thereafter these were presented to the Secretary-Treasurer of the District by the bank who informed the bank that he did not have sufficient funds on hand to pay same, and on or about March 28, 1946, they were returned to the Bekins." Thereafter, as Mr. Jerome D. Peters testified, they were again returned to the bank to remain for payment. Mr. Peters testified further (R. 20): "That at the time of the presentation of the bonds in question for payment at the composition

figure, the District did not have sufficient funds to pay."

That the order modifying the final decree (R. 5) was conditional in that the actual cancellation and surrender of the bonds was only to take place in the event of payment is shown by that part of the order of the Court which says that upon the failure of the district to make such payment upon such presentation and surrender of the bonds, the trustees shall no longer be bound by the terms of the final decree. Appellants respectfully submit that they fully complied with the Court's order, that the district was in default, and that the Trustees should no longer be held bound by the terms of the final decree.

The customary practice in California in handling the surrender and payment of bonds is to send them to a bank in the city in which the Treasurer's office is situated, or to send them direct to the Treasurer or to present them at the office of the Treasurer. In any event, the bonds are, as they were here, presented to the Treasurer. To present means in the definition of The New Century Dictionary to "hand or send in, as a bill or check for payment; tender". The act itself implies surrender. The Treasurer takes the bonds into his hands for payment. In this case they were refused payment and the appellee's counsel says "they were returned to the Bekins" (R. 19). The appellee knew more precisely what happened than appellants. And it seems obvious that the tendered surrender was refused and the bonds returned evidently after being received at the Treasurer's office.

This is what happens in common practice, and we respectfully submit that this Court's holding of non-surrender and non-compliance with the Court's order is harsh and not in accordance with the occurrence.

We further respectfully submit that if the order of the Court is to stand, interest during the waiting period from March 25, 1946 to date of payment on $2200 ought to be allowed by the Court.

CONCLUSION.

We submit that the considerations above discussed call for a rehearing of this appeal and for a reversal of the judgment of the Court below.

Dated, Turlock, California,
July 30, 1948.

Respectfully submitted,
W. Coburn Cook,
Attorney for Appellants and Petitioners.